No. 15,929

United States Court of Appeals

For the Ninth Circuit

JAMES HENRY AUDETT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Central Division.

APPELLANT'S REPLY BRIEF.

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I.

REPLY TO ARGUMENT I.

As set forth in the Appellant's Opening Brief, the Fifth Amendment to the Constitution requires that "due process of law" be afforded to a person charged with an infamous crime (page 4).[1] In view of the fact that defense counsel, Mr. Miller, representing appellant was also a duly appointed United States Commissioner it is clear that appellant was deprived of the due process of law.

In the first instance Mr. Miller was not in a position to practice law before the United States District

[1]Reference to page number in Appellant's Opening Brief.

Court of Idaho (pages 5-7). The Appellee's Brief asserts (page *16*)[2] that it is permissible for United States Commissioners to practice law before the Courts of the United States. Such a contention is clearly erroneous.

The United States Code expressly prohibits the practice of law before any Court of the United States by any officer or employee of the Administrative Office. Section 607, Title 28. It is equally clear from this Code that United States Commissioners are "officers or employees of the Administrative Office". The Administrative Office receives immediate notice of a Commissioner's appointment, Section 631(a); issues him an impression seal, Section 638, and necessary office supplies, Sections 604(a)(9), 639; receives from him quarterly accounting records, Section 636; and pays him his fees, Section 604(a)(6).

The appellee also asserts that Section 607 does not govern Commissioners, but that Section 631 is the exclusive section. Section 631 is only concerned with the qualifications of a person who may be appointed a Commissioner, and his tenure. It is submitted that the preceding Section 607 was intended by Congress to govern the activities of Commissioners by utilizing the all inclusive language indicated above.

The appellee attempts to minimize the significance of having a Commissioner as defense counsel for a federal prosecution by claiming that co-counsel was the chief attorney (pages *13* and *17*). Such an arrange-

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[2]References in italics are to pages in Appellee's Brief.

ment is not disclosed in the Transcript of Record. As a matter of fact the appellant has stated, also outside the record, that he retained Mr. Miller to represent him; that he did not know Miller was the U. S. Commissioner until March 27 and that Mr. Miller conducted the trial (appellant's letter to counsel dated January 7, 1959). It is significant to note, that since no affirmative defense was advanced, the cross-examination of witnesses for the prosecution would be the important efforts of counsel. An examination of the Record discloses that of the six witnesses called by the prosecution, five were cross-examined by Mr. Miller. It was also Mr. Miller who rested the defense immediately after the prosecution's presentation. It is submitted that Mr. Miller did occupy a position of importance to the defense and therefore his presence resulted in harmful error which affected the appellant's substantial rights. This negates appellee's position with Rule 52, Federal Rules of Criminal Procedure (pages *17-18*) which is concerned with harmless error.

Appellee seems to be of the opinion that Mr. Miller's moral integrity must be attacked before the circumstances of this case result in a denial of a fair trial (page *13*). This is not the case. The mere presence of Mr. Miller, a United States Commissioner and an officer for the administration of the Courts, resulted in a denial of appellant's right to competent counsel necessary for a fair trial. It is the possibility of having a biased person in this position of serving two conflicting interests, that the Fifth Amendment

to the Constitution seeks to prevent. Mr. Miller had the duty as defense counsel to require his employer to prove his client's alleged guilt beyond a reasonable doubt, and to assure his client that his employer would prosecute and conduct a fair trial. These circumstances result in the curious situation where one government body has investigated, charged, and prosecuted the same crime and individual, conducted the trial, and defended, sentenced and imprisoned that same individual. Therefore, without even questioning the integrity or sincerity of any person connected with such a system, it is obvious that the Fifth and Sixth Amendments to the Constitution intended to prevent such an unfair procedure. The un-balanced trial would be subject to the inherent weakness of no adequate protection for the accused. By having a vigorous independent representation for the accused, the likelihood of the assertion of all his rights and his side of the facts will be greatly increased. Therefore, as a minimum standard of fairness, at least the procedure of trial should be such that will assure the accused of the effective assistance of counsel. Simply decreasing the possibility of an unbalanced trial is a long step toward protecting the innocent and punishing the guilty.

The appellee has placed an onerous burden on a lay person to recognize during his trial that his counsel is not adequately representing him (page *13*). An individual not versed in the substantive elements of criminal law and the procedures currently prevailing in the Courts is not cognizant of his position. Indeed,

this is the very reason that he has a right to counsel not associated with the prosecution. A rule binding a defendant to the choice of an attorney who has incorrectly explained the law concerning his selection is not logical.

Also, the appellee has made an erroneous conclusion that the appellant "was fully advised as to his constitutional rights" (page *16*). All that the Court asked the appellant was whether he knew that Mr. Miller was a Commissioner and if he would waive any question to the point. The appellant was not advised that the United States Code prohibited Mr. Miller to act as counsel for him. In effect, the appellant did not know what rights he was waiving. In fact the Court did not even explain to the appellant the nature of a Commissioner's appointment. Again, the need for independent counsel, who knows the law, to protect the accused's rights is apparent. Granted that appellant had the right to choose his own counsel, he should have been advised that the one he selected was not allowed to practice law in the Court where he was being tried.

II.

REPLY TO ARGUMENT II.

Appellant's assertion that he was not represented by the effective assistance of counsel, to which he was entitled, is not because his counsel declined to fabricate a defense, as appellee would lead one to believe (page *18*). Rather it is appellant's belief that his trial

counsel should have gone further than cross-examining the witnesses for the prosecution and have introduced some witnesses for the defense. Appellant has stated, not in the Record, that he repeatedly requested Mr. Miller to subpoena certain witnesses who could testify to appellant's whereabouts on the day of the alleged bank robbery (page 14). The fact that such requests do not appear in the Record demonstrates the ignorance of law possessed by the appellant, and the position of Mr. Miller. Their absence in the Record does not mean that requests were not made, as appellee contends (page *21*), but that they were not made properly. Again a confirmation for the need of independent counsel.

The appellee concedes "that the whole theory of the defense was that the government did not produce sufficient evidence upon which a conviction of guilty could be sustained" (page *19*).

The appellee strongly contends, however, that the conviction was amply supported by the evidence (page *22*). Therefore, the selection of the particular defense utilized by defense counsel, as the sole defense, was not an exercise of good judgment; particularly when the appellant requested witnesses in his behalf. Yet the appellee has great praise for the defense counsel (page *20*).

The appellee did not "positively and conclusively [place] the responsibility for the commission of this crime upon the shoulders of the appellant" as they contend (page *21*). The only evidence which connected the appellant with the crime was the testimony of

Hall and McClure, who were alleged accomplices. Their respective accounts of the commission of this crime, and the alleged connection of the appellant thereto is full of inconsistencies (page 20). Therefore, the admission of testimony from responsible persons that the appellant was not near the scene of the crime on the particular day would have carried great weight toward discrediting the inconsistent stories of the accomplices.

III.

REPLY TO ARGUMENT III.

The evidence upon which the conviction can be sustained was all given by self-confessed accomplices who received very light sentences for their trouble. Appellant does not charge, as is misinterpreted by appellee, that "the accomplices received promises of a reduced sentence *in exchange for merely a little perjury*" (pages *23-24*). Appellant has merely pointed the vicious result of a rule of law which allows a man to be convicted of a crime on the uncorroborated testimony of a self-confessed accomplice. The result of such a rule of law necessarily is that a man guilty of a crime knows that if he will only implicate another, he will receive a reduced sentence. Appellant certainly does not suggest that the United States Attorney offered the reduced sentence in return for perjury. Appellant suggests that the temptation to commit perjury when the reward for doing so is freedom or a reduced sentence is a temptation too strong for a man with a weak conscience.

Appellee argues that the testimony of the accomplices was believed by the jury as demonstrated by their verdict. Although the jury was instructed to view the testimony of the accomplices with caution, it was not instructed of the primary reason why it should do so, namely, that an accomplice in return for his testimony could expect to receive a reduced sentence.

For the reasons set out here and in the opening brief, the conviction should be set aside.

Dated, San Francisco, California,
January 26, 1959.

Respectfully submitted,
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